

UNITED STATES OF AMERICA )  
 )  
v ) No. EP:17-MJ-4409(1)MAT  
 )  
ELBA LUZ DOMINGUEZ-PORTILLO )

APPEARANCES :

For the Defendant: Mr. Sergio Garcia  
Assistant Federal Public Defender  
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Interpreter: Provided

Transcript produced by Rhonda McCay, CSR, RPR.

1 (Proceedings called to order)

2 THE COURT: All right. Good morning. And let  
3 me have just a moment here. Thank you.

4 All right. The Court calls the following  
5 cases:

6 17-M-4409, United States of America versus Elba  
7 Luz Dominguez-Portillo;

8 In EP:17-M-4456, United States of America  
9 versus Maynor Alonso Claudino Lopez, EP:17-M-4461;

10 United States of America versus Jose Francis  
11 Yanes-Mancia;

12 EP:17-M-4462, United States of America versus  
13 Natividad Zavala-Zavala;

14 And EP:17-M-4499, United States of America  
15 versus Blanca Nieve Vasquez-Hernandez.

16 We are here for an evidentiary hearing. We're  
17 also here for a *Frye Lafler* hearing.

18 Let me have announcements, please.

19 MS. LOPEZ: Good morning, Your Honor. Noemi  
20 Lopez, Douglas Rennie, and we're ready for the United  
21 States.

22 THE COURT: Good morning.

23 MR. GARCIA: And good morning, Judge. Sergio  
24 Garcia, on behalf of all the defendants. Ready to  
25 proceed, Judge.

1 THE COURT: Good morning.

2 All right. We do have a pending motion to  
3 dismiss that the defendant -- the defendants filed. The  
4 Court ordered an evidentiary hearing to afford the  
5 parties the opportunity to present any evidence that  
6 they felt might be necessary. We discussed this briefly  
7 at the hearing last week.

8 Let me start with the -- with Mr. Garcia. Do  
9 you have any evidence that you wish to put on?

10 MR. GARCIA: No, Judge. We'd just like to --  
11 to request argument so that we can establish a clear  
12 record for purposes of any possibility of appeal.

13 THE COURT: All right. Let me ask the  
14 government. Does the government have any witnesses it  
15 wishes to present?

16 MR. RENNIE: No, Your Honor, we do not.

17 THE COURT: Okay. Thank you.

18 And, you know, I'll give you, in terms of -- of  
19 argument, I guess, basically, at this point, if you want  
20 to just address the substance of the motion to dismiss,  
21 we can take that up, and -- but I'll give you --

22 MR. GARCIA: I'll only need about five, ten  
23 minutes just -- just to argue, just to make sure that  
24 the record is clear.

25 THE COURT: Okay.

1           MR. GARCIA: It's important that the record is  
2 clear.

3           THE COURT: Let's try to go with about five, if  
4 we could, and I'll give the government, obviously, the  
5 same opportunity.

6           MR. GARCIA: Thank you, Judge.

7           THE COURT: Yes, sir.

8           MR. GARCIA: Thank you, Judge.

9           Judge, with respect to our motion to dismiss,  
10 it is important to understand that we are not here with  
11 our motion testing the strength or the weakness of a  
12 1325 charge. We actually are arguing that these  
13 defendants shouldn't even be here. They should be in  
14 immigration court.

15           What we're arguing is the element of  
16 compulsion, in other words, the separation from their  
17 children that removes the voluntariness of any possible  
18 plea in violation of due process. The law is clear  
19 under the Flores Settlement Agreement, these defendants  
20 cannot be separated from their children.

21           Immigration Customs Enforcement, ICE, the  
22 branch at interest, directives provide, quote, ICE  
23 personnel should ensure that the agency's immigration  
24 enforcement activities do not unnecessarily disrupt the  
25 parental rights of both alien parents or legal guardians

1 of minor children. Particularly, attention should be  
2 paid to immigration enforcement activities involving  
3 parents or legal guardians who are primary caretakers,  
4 safeguarding their parental rights, close quote.

5         The Supreme Court has stated that a basic right  
6 and an essential right is that of a parent to the  
7 custody of his children, and congress has manifested its  
8 intent regarding these cases. When congress  
9 appropriated Department of Homeland Security money, it  
10 indicated, quote, If detention is necessary, the report  
11 language encourages ICE to house family members together  
12 in known communal home-like environments until the  
13 conclusion of the immigration proceedings. That is the  
14 Congressional Record 152. It could be found at 2006  
15 Westlaw 1594390.

16         Clearly, the interest of -- of the intent of  
17 congress is to keep these families together. In  
18 addition, the Flores Settlement Agreement provides an  
19 opportunity for release -- simultaneous release on an  
20 immigration bond for the parent and the child. And when  
21 that is not possible, congress has also manifested its  
22 intent. It has indicated, quote, and when detention of  
23 family units is necessary, the committee directs DHS to  
24 use appropriate detention space to house them together,  
25 close quote. And that is the Congressional Record 151,

1 and it could be found at 2005 Westlaw 1185446.

2           Keeping the families together is clearly the  
3 intent of congress, and the government is violating the  
4 law. It's breaking the law. It's not following the  
5 law, and that implicates due process. Why? Because due  
6 process applies to, quote, even those whose presence in  
7 this country is unlawful, involuntary or transitory.  
8 That is *Shaughnessy versus U.S.*, 345, U.S., 206, 1953.

9           The violation of due process occurs in two  
10 ways. First, it deprives these defendants for an  
11 opportunity to go through the immigration process and  
12 perhaps obtain asylum. These defendants don't have any  
13 prior record. If they obtain asylum, all of a sudden,  
14 they have a status here in the country, and a 1325  
15 charge doesn't work because, all of a sudden, they have  
16 legal presence in this country.

17           It also violates due process in a most serious  
18 way because it's coercing these defendants to plead  
19 guilty. Can anybody doubt that these defendants want to  
20 be with their children? They're not going to want to go  
21 to trial. They want to get to them as soon as possible.  
22 They left their countries with the most precious thing  
23 they have, their children.

24           So this is a tactic to coerce the defendants to  
25 plead -- to plead guilty. But the law is clear when it

1 comes to pleas. The law says that any plea that is the  
2 product of coercion, either mental or physical, unfairly  
3 obtained through ignorance, fears or inadvertence is not  
4 good. And that is *Kercheval versus U.S.*, 274, U.S.,  
5 220, 1927.

6 This tactic either renders *Padilla* ineffective,  
7 because my work under *Padilla* in the Supreme Court  
8 decision, I need to advise them of the consequences  
9 of -- of entering, the immigration consequences, but I  
10 can't do anything about it.

11 In -- in a brief, we describe the government  
12 conduct as outrageous, and the government is surprised.  
13 Why is this outrageous? Because it's breaking  
14 congressional intent, it's not abiding by the -- by the  
15 Flores Settlement Agreement, and they also have the  
16 nerve to file a trial motion while a pretrial motion is  
17 pending, the *Lafler Frye* hearing, which I would argue  
18 could be constitute -- could constitute misconduct on  
19 the part of the prosecution because we have a pretrial  
20 motion pending, and that could be dispositive the *Lafler*  
21 hearing -- *Frye* is something before we go to trial, so  
22 we need to do that. They are doing all these tactics  
23 simply to obtain a conviction, a misdemeanor conviction.  
24 I would argue that that is outrageous.

25 I would also argue that the prosecution of

1 these defendants is in bad faith in violation of due  
2 process. Why is it in bad faith? Well, because if  
3 these defendants were allowed to go through the  
4 immigration process, but for their 1325 charges, they  
5 could be in immigration, seeking the protections that  
6 they are probably entitled because these defendants  
7 don't have any prior record.

8 Now, the government files a response, and I'd  
9 just really like to address it for purposes of the  
10 record. This response is meritless. At page 9, they  
11 say "We don't cite any authority." Putting aside the  
12 fact that this is a novel issue of first impression in a  
13 criminal proceeding, the arguments that I'm raising, we  
14 cite the first -- the Fifth Amendment. Last time I  
15 checked, that was law and good law.

16 The problem from the government here is the  
17 Fifth Amendment, because if these clients plead guilty,  
18 they will face extreme hardship and will be prejudiced.  
19 They are going to be deported with no guarantee of ever  
20 seeing their children again.

21 So the government in their brief provides an  
22 alternative, let's go to trial. Well, that puts my  
23 clients in the same position. They are going to end up  
24 being deported. They are going to end up being  
25 convicted with a criminal record with no possibility, no



1 guarantee to see their kids again.

2           Furthermore, that doesn't address our position.  
3 We're arguing in our motion that we shouldn't even be  
4 here. These defendants should be in immigration court.  
5 So that doesn't take care of our motion.

6           THE COURT: Let me interrupt you briefly. So,  
7 I mean, your position, as I understand it, is that any  
8 possible immigration relief that they might be entitled  
9 to in, you know, citing the Flores Settlement and -- and  
10 any -- the possibility of either pursuing asylum claims,  
11 if that's what they wanted to do, or participating in  
12 the immigration proceedings of their -- of their kids,  
13 you're saying that that has to be a precursor to -- that  
14 that should happen before the government prosecutes?  
15 Because it seems to me the government has jurisdiction  
16 to prosecute these cases.

17           There's been an entry -- I mean, there's an  
18 alleged entry with -- their status is as aliens at the  
19 time of their entry or attempted entry. And so,  
20 jurisdictionally, I think they have the jurisdiction --  
21 or it seems to me they have the jurisdiction to pursue  
22 these charges.

23           Is that your position --

24           MR. GARCIA: My --

25           THE COURT: -- that the immigration processes

1 that you're talking about should be -- should be dealt  
2 with before they're ever even prosecuted?

3 MR. GARCIA: Yes, because of all of the reasons  
4 that I will briefly address, Judge, if you'll just let  
5 me finish. That is correct.

6 Let me just go back quickly -- and I'll address  
7 those concerns in a minute. But you're right, that's my  
8 position. But I tell you what, I haven't really told  
9 you why that is necessary.

10 Going to trial is simply another mechanism to  
11 strip these defendants of their rights that they might  
12 have in an immigration proceeding, and it's also  
13 stripping the children away from the children [sic]  
14 because let's -- let's not forget that these children  
15 want to be with their parents too. We have a  
16 seven-year-old kid involved in these cases. And can  
17 anybody doubt that he wants to go to -- he wants to be  
18 with his parents?

19 So going to trial, to answer your question,  
20 it's also a violation of due process. Why? Because we  
21 are missing the most important thing, the material  
22 witnesses, the children. They don't have them here. In  
23 fact, they don't even list them in their complaints.  
24 Why? So even going to trial would be a violation of due  
25 process.

1           The government is using a strong-arm approach  
2 to coerce these defendants into pleading guilty, and the  
3 [indiscernible] and red herrings. For example, at  
4 Footnote 3, they suggest that these guys may not even be  
5 their real parents. Well, if that was the case, the  
6 government would not hesitate to bring felony charges  
7 for trafficking minors.

8           At Footnote 8, they said that they are engaged  
9 in criminal conduct. Well, seeking asylum, escaping  
10 violence from your country, that's not a government --  
11 criminal conduct.

12           At page 11, they said that they are concerned  
13 because Latinos engage in trafficking minors. Well,  
14 that is just stereotyping. That's profiling. Not every  
15 Latino that crosses that border with a child is  
16 trafficking minors.

17           At page 16 --

18           MS. FRANCO-GREGORY: Your Honor, I'm going to  
19 have to object to the defendants' counsel's  
20 characterization of the government stating Latinos  
21 traffic minors. That is nowhere contained within the  
22 response.

23           THE COURT: All right.

24           MR. GARCIA: If you look at page 11, Judge, and  
25 you read it, you will make that decision. They're

1 clearly referring to a concern, because at the south  
2 border, the Latinos, and most importantly, Mexicans,  
3 they engage in this kind of behavior.

4 At page 16, they say, well, you know what,  
5 let's have them plead guilty and then we'll go through  
6 all of our procedures, the Office of Refugee  
7 Resettlement. How about following procedure from the  
8 get-going, and not separating these kids from -- from --  
9 these parents from the children?

10 At page 16, they have the audacity to say they  
11 are getting a \$5,000 bond. My clients are indigent.  
12 They don't even have 5 cents, Judge.

13 And then they say, at page 15, the reason we  
14 are doing that is because we are concerned they might go  
15 to Mexico. These guys are from Central America, from  
16 Honduras and El Salvador. Again, stereotyping, because  
17 not every person with brown skin wants to go to Mexico.  
18 These guys don't even have ties to Mexico --

19 At page 18, they suggest to you that they might  
20 not even be in for purposes of due process. Well, if  
21 that is the case, I would argue that they are not in for  
22 1325 purposes. I argued that issue in the Fifth Circuit  
23 recently in a 1326 case.

24 At page 18, they suggest, well, you know, if  
25 this was a [indiscernible] defendants wouldn't even be

1 able to defend them. Well, that's not true. Minors  
2 that sufficiently related, ancillary matters, the  
3 statutes provides for -- for us to help these  
4 defendants. Not only that, Human Rights Watch, ACLU,  
5 they are ready to help.

6 Congress has said -- the governments says that  
7 they are concerned with policy. Well, let's remind --  
8 let's remind the justice department who does policy.  
9 Congress, not the justice department.

10 But if they want to talk about policy -- and  
11 I'm going to bring up [indiscernible] we're mentioning.  
12 If we allow the government to use these 1325 charges,  
13 they are rendering asylum and refugee law meaningless.

14 And most important, Judge, this is something  
15 that I want you to take -- take note of this. They are  
16 using that mechanism to terminate parental rights, and  
17 I'm going to tell you why. Because these clients are  
18 going to plead guilty, they are going to be deported,  
19 and they are not guaranteeing to keep track of their  
20 children. We don't know what's going to happen. And  
21 that is terminating parental rights. In this country,  
22 even the most serious criminals have a right to due  
23 process when terminating parental rights.

24 This is a big problem. They are using,  
25 actually, an asylum issue into a parental rights issue.

1 They are having these kids, and the -- and the clients  
2 to face extreme hardship because [indiscernible] the  
3 children.

4 In their complaints, they don't mention -- you  
5 look at every -- every complaint here, every single  
6 complaint, they don't mention the existence of the kids.  
7 Why? Because they are hiding it, right? But my  
8 understanding that today, maybe the press is here, and I  
9 don't think they can hide that today.

10 Judge, in closing, I would like to say that,  
11 lately, in the news, we have seen that the justice  
12 department trumps the courts and congress, but that's  
13 not the way it is. Congress writes the laws, and the  
14 courts apply the law.

15 William Shakespeare wrote in Hamlet, "Something  
16 is rotten in the state of Denmark." Well, something is  
17 rotten in the Western District of Texas. The act of  
18 separating these parents from their children really  
19 stinks.

20 For these reasons, I respectfully request you  
21 grant the motion to dismiss.

22 Thank you, Judge.

23 THE COURT: All right. Thank you.

24 And the government wants to respond.

25 MR. RENNIE: Yes, Your Honor.

1 THE COURT: Sure. Come on up, Mr. Rennie.

2 MR. RENNIE: Your Honor, the government agrees  
3 that the law should be upheld in this case. The problem  
4 for the defendants is that there is no legal basis for  
5 the relief they are requesting in this context.

6 The relief they are requesting is completely  
7 unprecedented and not supported by a Fifth Amendment or  
8 any of the other legal authorities they are citing in  
9 their motion.

10 THE COURT: And just so that we're clear, the  
11 relief we're talking about is the dismissal --

12 MR. RENNIE: Yes, Your Honor.

13 THE COURT: -- of the cases as a -- as a  
14 sanction, essentially?

15 MR. RENNIE: Yes. And that's because this is a  
16 criminal proceeding. This is not an asylum case. We  
17 are here only on the criminal charges, not here to deal  
18 with the immigration consequences of what they are  
19 requesting.

20 This Court's jurisdiction is limited to those  
21 criminal charges, and what's before the Court is whether  
22 they can have any defenses to those charges, whether the  
23 government has evidence to show that they indeed entered  
24 illegally.

25 Whether they can obtain asylum at some future

1 date is not relevant. It doesn't matter because they  
2 were still, by what appears to be their own admission in  
3 their filing, aliens to the United States when they were  
4 crossing.

5           And, you know, it's not a minor point that they  
6 were actually crossing at places that were not a port of  
7 entry. If you come in and you're seeking asylum and  
8 fleeing violence, one way to do it would just be to walk  
9 up through the port of entry, and say, "Hey, I want to  
10 seek asylum. I have problems. I'm fleeing back home."  
11 That's not what they did here. They were coming across  
12 the river at various different points along the border  
13 here in El Paso.

14           So even if they could obtain asylum at some  
15 point, that doesn't defeat the fact that they were  
16 aliens to the United States when they were crossing the  
17 border here.

18           Now, second, the remedy here is a trial. You  
19 know, the idea that the defendants here are saying that  
20 a trial is not adequate or is somehow -- going to trial  
21 strips them of their rights, I believe defense counsel  
22 said. A trial is their constitutional right. That is  
23 their remedy in this situation when faced with a  
24 criminal charge. So the idea that this is somehow not  
25 an adequate remedy is preposterous.



1           And the Fifth Circuit's case law makes it very  
2 clear that, you know, if you had an involuntary plea,  
3 even if they could establish that, their remedy would be  
4 for that plea to be rendered invalid. Then they could  
5 go to trial.

6           THE COURT: In a certain context, *Padilla* says  
7 essentially that, right? That at that point and  
8 under -- under *Padilla*, because it was not a knowing  
9 plea in that particular case -- excuse me. Because it  
10 wasn't a knowing plea, because he didn't know the  
11 immigration consequences for that particular defendant,  
12 basically, the remedy was that this is an invalid plea,  
13 and you can go back to the table and renegotiate or have  
14 a trial.

15           MR. RENNIE: Exactly, Your Honor.

16           THE COURT: Exactly, right?

17           MR. RENNIE: Yes. And the Fifth Circuit has  
18 said that as well in a case -- a case we did cite, that  
19 when there was a *Padilla* violation, that's the remedy,  
20 that you go back. The plea is rendered invalid. The  
21 defendant can then negotiate a new plea agreement or go  
22 to trial. That is the remedy in this situation.

23           And, you know, that is if you can establish  
24 that a plea is involuntary or you are being coerced in  
25 some way, which they haven't done here. And -- and we

1 have cited extensively in our response, there are pages  
2 of cases where the Fifth Circuit and other courts have  
3 said these types of pressures related to family concerns  
4 or even the government withholding some information is  
5 not the type of thing that could render a plea  
6 involuntary. It has to be knowing and intentionally.  
7 There has been no proof here that their ability to make  
8 a plea has been overcome. And, again, they haven't  
9 actually pled guilty here is the main point.

10 And, you know, there has been a lot of talk  
11 about due process and the Flores Settlement. And all of  
12 the -- the case law and the Flores Settlement itself,  
13 these are also civil cases. These are all civil  
14 remedies in the context of their detention on criminal  
15 charges.

16 Really, the only due process concern they have  
17 is whether that is valid. And we have a statutory basis  
18 for that. It's 18, USC, 3142. The case law clearly  
19 controls and says that detention in these circumstances  
20 at a \$5,000 bond is perfectly reasonable to the extent  
21 that, you know, once they resolve their criminal cases,  
22 they can bring whatever challenges they want in the  
23 context of that immigration proceeding. But that's not  
24 why we're here.

25 The Flores Settlement itself, that concerns the

1 detention of juveniles. It doesn't say what the  
2 government can or can't do in terms of charging  
3 defendants with a 1325 criminal charge.

4 THE COURT: And, in fact, let me just interrupt  
5 you briefly. You had a footnote in -- in the response  
6 that you filed where you said -- because I -- I  
7 requested as part of my briefing order that the  
8 government basically -- I want to know what are the  
9 policies on this, right? And so -- and you indicated  
10 there's no statutory or regulatory authority that  
11 compels the government to provide this -- just  
12 information, and I -- generally, with regard to the  
13 well-being or the location of -- of the defendant  
14 parent's kids, there's no authority that compels the  
15 government to do that. Correct?

16 MR. RENNIE: We did not find any such authority  
17 in our research, Your Honor.

18 THE COURT: By the same token, is there any  
19 authority that says that the government -- that it's  
20 forbidden from providing that information?

21 Essentially, what I'm getting to is this: I  
22 don't think there is something that forbids it, but I  
23 think the government makes a policy decision that in the  
24 context of defendants that are prosecuted for a 1325,  
25 that it's -- they're not provided this information or

1 that there's not a policy in place. Certainly, I don't  
2 think you identified a policy with regard to this. Is  
3 that correct?

4 MR. RENNIE: As far as I know, Your Honor. But  
5 I don't know that that is restricted just to 1325  
6 defendants.

7 THE COURT: Sure.

8 MR. RENNIE: I think it's a more general ORR  
9 policy, the Office of Refugee Resettlement, which had --  
10 we -- any agency that has an unaccompanied child must  
11 transfer that child to ORR, and I think it's their  
12 general policy that they're very restricted on who they  
13 give information to, understandably.

14 And as we noted in our brief, you know, there  
15 have been many instances where individuals have been  
16 attempting to enter or traffic children --

17 THE COURT: Sure.

18 MR. RENNIE: -- across the border.

19 THE COURT: And it's clear that your office  
20 prosecutes them. I mean, there's no question. And it's  
21 really what -- what Mr. Garcia was saying, the  
22 government pursues those cases and pursues them  
23 aggressively.

24 I mean, but -- you know, we -- we handle -- and  
25 just in the Western District, thousands of these 1325

1 cases, thousands. I probably -- I'm here five years.  
2 I've probably done thousands of sentences, I think.

3 And so this is a newer phenomenon, in my  
4 experience here, where, with Central Americans, there  
5 are these unaccompanied children, but...

6 And, I mean, I get that point that you're  
7 saying that there is no authority that compels you to do  
8 it, but there's nothing that forbids you from doing it  
9 either. I mean, and -- and -- but that's just --  
10 basically, what I'm trying to get to is there is no --  
11 no policy specific in -- specific to what information  
12 parents get when -- when the parents are accompanied by  
13 a minor and when the parents are prosecuted for some  
14 immigration crime. There is none.

15 MR. RENNIE: I think ORR has some of their own  
16 internal policies which governs how they give out  
17 information. So to some extent, I think that may govern  
18 the situation you're talking about.

19 THE COURT: All right.

20 MR. RENNIE: Because once they have the child,  
21 they want to keep that information confidential.

22 THE COURT: And I'll tell you, just briefly,  
23 something that confuses me is, so the parental rights  
24 directive and -- and the government indicates, in your  
25 response, that it's not really something that applies,

1 and it's, you know, something from a prior  
2 administration that's kind of a legal relic, I guess,  
3 but it's on the website. I mean, and it -- it talks  
4 about, in very strong terms, about how basically that --  
5 that -- that ICE will strive to protect the rights of  
6 parents in keeping them informed.

7           Even -- you know, even the ORR regs say that  
8 when, you know, a child is transferred, I believe the  
9 regulation states that, you know, parents are to be  
10 informed about where they are, and I -- I just -- I  
11 mean, we're getting a little bit apart from -- from kind  
12 of the core issues here, which are the motion to dismiss  
13 and the constitutional claims. But in terms of that  
14 policy, because I do think it affects -- or it can  
15 affect -- I should say that -- it can affect issues with  
16 regard to voluntariness, that it seems like there's  
17 policies that Homeland Security has, ICE has, certainly,  
18 that are still active policies. They certainly don't  
19 appear to have been rescinded. The public can rely on  
20 these websites -- on the ICE website and go to it and  
21 read that parental rights directive. But, I mean, I  
22 think the government is essentially saying it doesn't  
23 apply in a -- in a criminal case where somebody is  
24 charged with a crime, where a parent -- a defendant  
25 parent is charged with a crime and was accompanied by a

1 minor; and that, in either case, they can wait, and it  
2 can be a process where they can wait up to six months  
3 while their kids are in -- in immigration proceedings,  
4 which basically doesn't really leave them the  
5 opportunity to in any way participate in their  
6 immigration proceedings while they are happening.

7           If their -- if they -- if the kids are in ORR  
8 custody, they are in immigration proceedings, right? I  
9 mean, they are in immigration proceedings or deportation  
10 proceedings of some sort or they are pursuing asylum  
11 claims.

12           But by keeping the parents out of the loop  
13 while their case is pending -- or while the criminal  
14 case is pending, I mean, it doesn't -- the reality of  
15 it -- it's the practical effect of it, I guess, is what  
16 I'm saying is they're -- they're not participating in  
17 any meaningful way -- in any way whatsoever in their  
18 child's legal proceeding, which seems to run counter to  
19 ICE's own policy regarding the parental directives  
20 policy which even -- it's not as --

21           I mean, the government described it as -- what  
22 was it? -- aspirational. But really it does talk about,  
23 you know, appointing a parental rights administrator  
24 within the certain -- you know, within the districts.  
25 There are other kind of substantive things and not just

1 a broad declaration of parental rights, although it does  
2 that too.

3           So, I mean, that's really a little bit of the  
4 confusion that I get, basically, of what -- what exactly  
5 the government policies are. Because in the absence --  
6 it seems to me, in the absence of a specific policy to  
7 have these parents that are being prosecuted involved in  
8 a meaningful way in the immigration procedures -- in  
9 immigration proceedings of their kids and just to know  
10 their well-being and all these other things, I mean,  
11 just to know how their kids are doing, that when they're  
12 prosecuted, it's kind of a no man's land of information  
13 in terms of their kids. I mean, there is no policy.

14           And it -- the sense that I get is that the  
15 government's default position is, in the absence of a  
16 policy, the policy is no information. And there's  
17 nothing prohibiting us, but there's no information for  
18 the parents while the criminal case is pending. And  
19 that's -- that gives me a little bit of -- I have a  
20 little trouble with that, okay?

21           Now, and I'll -- I'll concede this, it is  
22 separate from -- it, in some sense, from the remedies  
23 issue, which is really what we've been talking about  
24 this morning, what the legal remedies are.

25           But anyways, I don't know if there's anything



1 in there that you want to address or if I have misstated  
2 something, but that's just -- that's just something that  
3 I wanted to get out -- get out there, just so you know  
4 what I'm looking at.

5 MR. RENNIE: I understand, Your Honor.

6 The problem with, I think, what you're saying  
7 is that I don't think that they're situation is that  
8 much different from anyone who has been detained on  
9 criminal charges, any arrestee.

10 Your liberty interests are necessarily going to  
11 be restricted if you are in jail because you're facing a  
12 criminal charge. And to the extent that they can -- the  
13 facility that they're in allows them to pursue ORR's  
14 procedures in order to try to obtain more information,  
15 they can do that.

16 But they probably -- in a practical sense,  
17 you're correct. They don't have the same ability to do  
18 so because they are facing criminal charges. So --

19 THE COURT: And let me say, the ORR's own  
20 website -- sorry for interrupting. But the ORR's own  
21 website says, you know, look into -- their information  
22 that they provide is, "We might be able to get a  
23 message. If you're a parent and you're concerned, we  
24 might be able to get a -- basically, a one-way message  
25 to the child," and that's about it.

1           And I don't even know how that 1-800 number  
2 that's provided -- and I know we -- we've handled a lot  
3 of these cases in this court, Mr. Rennie, when you've  
4 been here, and when I've asked about this, "Well, the  
5 Border Patrol sometimes, pursuant to ORR regs, provide a  
6 1-800 number in -- in English and in Spanish to -- to  
7 the defendants," and that's basically it. I don't -- I  
8 don't know what other information they're given about  
9 that. I mean, that's -- that's really kind of an  
10 evidentiary thing, but that's been my sense when I've  
11 asked here in court.

12           But, look, I'm going to let you get back to it,  
13 but I wanted to raise those issues.

14           MR. RENNIE: I understand, Your Honor.

15           And I think in some of these cases, they --  
16 they're -- they did provide that -- that number at  
17 least --

18           THE COURT: Right. I think so too.

19           MR. RENNIE: -- to the defendants.

20           I will also point out that the policy on the  
21 website that you were talking about, it does explicitly  
22 state that it may not be relied upon to create any right  
23 or benefit, substantive or procedural, enforceable by  
24 law by any party in any administrative, civil or  
25 criminal matter. So it is, on its on face, restricted

1 in -- in what it does going forward.

2 THE COURT: And I think even the Flores  
3 Settlement has a disclaimer like that.

4 MR. RENNIE: Yes. Yes, Your Honor.

5 And, specifically, with respect to the Flores  
6 Settlement, there are, I believe, the Western District  
7 of Texas, itself, has held that it doesn't  
8 [indiscernible] parental rights. And I think the Ninth  
9 Circuit also followed that authority in making a similar  
10 finding.

11 As -- as far as due process goes, Your Honor,  
12 again, to the extent that, you know, they have parental  
13 rights, assuming that they are the parents -- and the  
14 government doesn't necessarily know is another big point  
15 here, is, you know, when you have people coming across  
16 the Rio Grande River with children, you don't  
17 necessarily know that this person is the child's parent,  
18 even though they may say that. It's -- and it's very  
19 difficult to confirm that type of information in this  
20 type of circumstance, which is the point we were making  
21 in our brief.

22 THE COURT: Yeah.

23 MR. RENNIE: So the other point is that the  
24 fact that they're claiming parental rights, and I don't  
25 know whether they have -- I can't advise them as far as

1 whether they have some due process right to a parental  
2 right in this circumstance, but as far as being confined  
3 in -- on criminal charges, that doesn't change the fact  
4 that that is adequate and constitutional. And the  
5 United States Supreme Court has upheld that statute that  
6 allows their detention in *United States versus*  
7 *Salerno*.

8 THE COURT: Right.

9 MR. RENNIE: Now, responding to some of  
10 these -- these other points, you know, as I was saying,  
11 defendant was saying that the law is clear that the  
12 Flores Settlement is being violated and says they cannot  
13 be separated. That's not what it says. And all of  
14 these -- even the policy that we're talking about  
15 before, these are talking about immigration detention.  
16 They're not talking about criminal defendants who have  
17 been charged with illegally entering the country.

18 And some of the other policies that the defense  
19 was citing, these are statements from a floor speaker of  
20 a single legislator on some appropriations acts.  
21 They're not -- they don't necessarily represent the will  
22 of congress in the same manner that defense counsel is  
23 suggesting.

24 Can I just have a moment, Your Honor?

25 THE COURT: Of course.

1 MR. RENNIE: Thanks.

2 Your Honor, just a couple more quick points.

3 THE COURT: Yes, sir.

4 MR. RENNIE: You know, co-counsel points out to  
5 me that one of the key points behind the Flores  
6 Settlement was to allow for unaccompanied children to be  
7 released to other adults. It's not necessarily  
8 something that requires them only to be released to a  
9 parent. It was something that was designed for the  
10 betterment of those unaccompanied children. And my  
11 understanding is that is what ORR tries to do in these  
12 situations.

13 I'm also -- co-counsel also pointed out that  
14 there is a regulation, 8, CFR, Section 236.3, Subsection  
15 F, which requires notice to parents concerning juveniles  
16 in detention in some circumstances.

17 THE COURT: Uh-huh.

18 MR. RENNIE: And our point regarding that is  
19 that this doesn't really change regarding whether the --  
20 the parent is being detained on criminal charges or  
21 not.

22 THE COURT: Okay.

23 MR. RENNIE: So it really just goes back to  
24 that main point of, you know, if they're being  
25 detained -- their liberty is necessarily restricted if

1 they're being detained on criminal charges.

2 And, Your Honor, in conclusion, we would just  
3 stress that, you know, this is not an asylum proceeding.  
4 It's not an immigration proceeding. There are ways to  
5 seek asylum without getting charged with illegal  
6 reentry.

7 And the defendants here, among some of the  
8 other ones that we've dealt with in the past few months,  
9 made a choice, and they decided to cross the river the  
10 way they did, not come up through the port of entry, and  
11 that's the reason why they're facing criminal charges  
12 now, and that's how we find ourselves in this situation.

13 And so, in conclusion, I would point out that  
14 this is not something covered by the Court's  
15 jurisdiction on criminal charges, and there's no basis  
16 for dismissal in this case or any of these cases. Any  
17 relief they would be entitled to would just simply be to  
18 have an involuntary plea vacated.

19 THE COURT: And -- and I think your -- your --  
20 your response, the -- the brief, talks about you believe  
21 the remedies in this case -- if there is no  
22 constitutional issue, the remedy is really just to make  
23 sure -- and -- and you don't disagree that the remedy is  
24 to explore the voluntariness of the pleas, number one,  
25 and -- and to really get into that issue, basically, as

1 part of a trial-rights-type argument, that -- that the  
2 Court can get into that.

3           And there is case law that says, when the Court  
4 has some concern or is aware of a particular issue --  
5 like, let's say, if somebody -- if there was a mental  
6 competency hearing, and they were found competent, but  
7 the Court has concerns about mental health, I mean,  
8 basically there's no litany. We don't -- we don't  
9 follow -- we have little scripts that we follow for our  
10 pleas, but on something like that, we can absolute --  
11 we're required -- I think the judicial office is  
12 required to delve into that issue, develop that issue to  
13 make sure that there is not something else at play here,  
14 and that the plea is voluntary, and they're pleading  
15 guilty because they are guilty and for no other reason.

16           I mean, that's essentially what you're saying,  
17 that that's basically the avenue we would need to follow  
18 here. Is that correct?

19           MR. RENNIE: We agree that you have discretion  
20 to inquire into those subjects, Your Honor, as part of  
21 the plea colloquy.

22           But as we've stated our view of the law, our  
23 general -- our position is that those types of concerns  
24 have not been found to render a plea involuntary.

25           THE COURT: All right. Well, and I don't know

1 that I agree with that necessarily or not. I know you  
2 briefed that issue, but I think it is something that a  
3 court certainly is required to get into on the record.

4 Again, the sense -- I just want to make sure  
5 I'm clear on this. The sense that I get -- that I got  
6 from the response and what you're saying today is that,  
7 once this proceeding is over -- and these are petty  
8 offenses. These are pretty much the lowest type of --  
9 or least-severe type of federal offenses that can be  
10 charged -- that once this proceeding -- this procedure  
11 for the defendants is over, that they're free to pursue  
12 whatever immigration relief they -- they think they need  
13 to proceed or they feel they need to proceed. Is that  
14 correct?

15 MR. RENNIE: Yes. That's our understanding,  
16 Your Honor.

17 THE COURT: Okay.

18 MR. RENNIE: Yes.

19 THE COURT: And go ahead. I'm sorry.

20 MR. RENNIE: No. Please continue.

21 THE COURT: What I was going to say was, but  
22 that's -- that's their immigration proceeding. But  
23 meanwhile, you have their children's immigration  
24 proceeding, and your view is that while -- I mean, I  
25 think the practical effect of what you're suggesting



1 might be that they don't have a right to be involved.  
2 Notwithstanding the parental rights directive, they  
3 don't have a right to be involved. Basically, that any  
4 involvement they might have in their children's  
5 immigration proceeding is stayed while this criminal  
6 matter is pending, which can be up to six months. I  
7 mean, that's the practical effect of it.

8 I don't see how meaningfully they can  
9 participate, and the best they can do under the ORR  
10 regulations is to maybe send off a one-way message that  
11 some person at a call center at ORR says, "We'll get the  
12 message to your child." I mean, I don't know how else  
13 they meaningfully participate in their child's  
14 immigration proceedings. And they're in immigration  
15 proceedings.

16 MR. RENNIE: I understand what you're saying,  
17 Your Honor. But our position is that it's not stayed.  
18 They -- they can participate to the extent that any  
19 criminal defendant who is being detained could  
20 participate in that type of situation. I'm sure it's  
21 easier to do so once they are out of criminal detention.

22 But I don't see how that's different from any  
23 other criminal defendant who has family issues or other  
24 civil problems that they are facing.

25 THE COURT: No question -- no question. Once

1 your liberty is restricted, you are restricted from  
2 doing that. You know, my sense is just -- you know, in  
3 state court, if you had those kinds of issues, CPS is  
4 involved, and there's --

5 I mean, some of those parents have rights to  
6 visitation, basically, until some court of competent  
7 jurisdiction or some tribunal of competent jurisdiction  
8 makes a determination that they no longer have parental  
9 rights. They have parental rights, even for somebody  
10 charged with the most serious crime under the Texas  
11 Penal Code. And I'm just using that by way of example.

12 But I just -- the -- let me just say this, and  
13 I appreciate your comments this morning. An issue that  
14 I -- that I have is that they're really, as a practical  
15 matter, there's no meaningful way for these parents to  
16 know anything about their kids.

17 I -- I just don't see it even with the ORR regs  
18 that -- you know, the handout that they get sometimes --  
19 we've seen it in court. I mean, basically, which is  
20 what's on the web page. It gives the opportunity for a  
21 message. It doesn't provide for a communication between  
22 the two. It doesn't provide them the opportunity to  
23 participate in -- in the immigration proceedings that  
24 their kids are going through. And so, you know, that --  
25 that's -- that's just something that has troubled me

1 from the get-go.

2           You know, we -- we get questions in these -- in  
3 these immigration 1325 proceedings, you know. Do the  
4 defendants have anything to say before we impose  
5 sentence? And we go through that very frequently. And  
6 you may have been here for some of these, I think,  
7 where, "Well, what about my property? What about my  
8 IDs?" And, you know, I know -- I know that the Border  
9 Patrol has very detailed policies -- I know because I've  
10 seen them -- detailed policies about the return of  
11 property. And I'm going to tell you, and I will say it  
12 right now, I mean, they do a very, very commendable job  
13 of getting that property back to defendants.

14           I mean, you know, I -- I -- I mean, I can say  
15 that just because I've had these discussions with Border  
16 Patrol people, you know, sometimes they might return 60  
17 packages of property, clothing and backpacks and, you  
18 know, personal effects and other things. They'll return  
19 back, work closely with the Mexican consulate in the  
20 case of defendants who are Mexican nationals. And so we  
21 have these detailed policies, and they do a great job  
22 of -- of doing that.

23           I just -- it just surprises me that, in this  
24 matter, where it involves something that is paramount  
25 important to any parent, okay -- and notwithstanding the

1 concerns of the government with, you know, combating the  
2 exploit- -- exploitation of children. I mean, I think  
3 they take these matters extremely seriously. You  
4 prosecute them seriously. But -- I mean, that's not all  
5 the cases, certainly. I mean, that is -- that is part  
6 of -- that's something that happens.

7 But, I mean, I think where somebody has a  
8 legitimate concern about their kids, it just -- it  
9 really surprises me that there is no policy  
10 regarding providing some of that minimal information.

11 I believe that the constitution says you have a  
12 fundamental right to familial association, and the bare  
13 minimum application of that right, in my opinion, would  
14 be the providing of some information regarding the  
15 well-being of -- of the defendant's children or even  
16 providing for some communication.

17 And that's not me just saying that, that's  
18 ICE's parental directives from 2013 saying that, which  
19 is not a policy that has been rescinded, which is still  
20 on their website.

21 And so just so you understand that that's --  
22 that's an issue that gives me some concern.

23 All right. And I appreciate your comments.  
24 I'm going to take -- I'm going to take just a very brief  
25 recess, about two minutes.

1 Chris, let me visit with you.

2 And we're in recess.

3 (Recess taken from 10:21 a.m. to 10:23 a.m.)

4 THE COURT: All right.

5 MR. GARCIA: Judge, before we get going --

6 THE COURT: Yes, sir.

7 MR. GARCIA: -- do you think I could have 30  
8 seconds just to clarify one statement that was made?

9 THE COURT: That's fine.

10 MR. GARCIA: I think it's important for the  
11 record.

12 One of the statements that was made by the --  
13 by the government is that, you know, they have access to  
14 this information, they can check the Internet. We have  
15 Ms. Zavala right here. Ms. Zavala -- make sure I get  
16 Zavala-Zavala, Natividad Zavala, can't even write or  
17 speak. She had to sign with an X. I had to tell her  
18 how to sign. How is she going to check all this  
19 information and dial numbers?

20 And just briefly, the last -- the last -- the  
21 last comment, the congressional -- congress intended for  
22 these kids to be placed with relatives, that could not  
23 have been the intent, because in the case of Ms. Elba  
24 Luz Dominguez-Portillo, she has no family. There's no  
25 relatives. And like you said, she has no meaningful

1 participation in her child's proceedings right now, as  
2 we speak.

3 So I just wanted to make sure that we clarify  
4 that for the record. Thank you, Judge.

5 THE COURT: I appreciate that.

6 And, you know, and I -- I will note, just --  
7 you know, we had a situation, and I -- I -- I cannot  
8 remember the defendant's name, but he was a speaker of  
9 an indigenous language from -- he may have actually been  
10 from Mexico is my recollection, from Mexico. But in any  
11 case, he was not a Spanish speaker. I mean, he was  
12 provided the 1-800 number. I don't know what good that  
13 1-800 number does in that circumstance at all. I mean,  
14 there's -- you know, these very kind of obscure  
15 languages here in the United States, so...

16 All right. I'm sorry. You were -- was there  
17 anything you wanted to add?

18 MS. FRANCO-GREGORY: Your Honor, if I may.

19 THE COURT: Yes, of course.

20 MS. FRANCO-GREGORY: I need to address certain  
21 issues.

22 The -- the hearing -- and I appreciate -- thank  
23 the Judge for allowing me to address the Court.

24 THE COURT: Uh-huh.

25 MS. FRANCO-GREGORY: The hearing seems to

1 have -- to have addressed many different issues.

2 THE COURT: Uh-huh.

3 MS. FRANCO-GREGORY: And the Court, along with  
4 defense counsel, have made statements regarding policy,  
5 procedures, statements made by HSI. And just from a  
6 general standpoint, Your Honor, the government would  
7 reiterate that these cases have been prosecuted for  
8 many, many years. There has been no policy change  
9 within the department.

10 THE COURT: Uh-huh.

11 MS. FRANCO-GREGORY: The government has always  
12 prosecuted individuals who have illegally entered the  
13 United States.

14 THE COURT: Uh-huh.

15 MS. FRANCO-GREGORY: These cases are  
16 misdemeanor cases, and as the Court well knows, often  
17 these defendants are sentenced to a time of time  
18 served.

19 THE COURT: Uh-huh.

20 MS. FRANCO-GREGORY: Unfortunately, these  
21 defendants have been in custody nearly five weeks due to  
22 the pending litigation.

23 The -- the government would offer that their  
24 parental rights are not being terminated. That has  
25 never been the contention. The thousands of cases that

1 have been presented to this Court, their -- their  
2 parental rights have never been terminated, Your Honor.

3           Indeed, as the Court well knows and as defense  
4 counsel well knows, there are situations where children  
5 are trafficked. The government and the Western District  
6 of Texas deals with a high volume of cases. As the  
7 Court noted, thousands of cases come through this  
8 Court.

9           THE COURT: Right.

10           MS. FRANCO-GREGORY: There is a method that we  
11 have to triage these cases.

12           These defendants have been charged with  
13 misdemeanor offenses. Our brief outlines in detail that  
14 they could potentially face felony alien smuggling  
15 charges. The inquiries that have been made of them only  
16 adds to the evidence that supports a felony charge of  
17 alien smuggling.

18           However, in this instance, the government has  
19 decided to go with misdemeanor charges based on certain  
20 factors that are well within the prosecution's  
21 discretion.

22           Your Honor, the ORR must safeguard the safety  
23 of those children. And for defense counsel to expect  
24 that their clients will be provided that information,  
25 that that is part of the criminal process, leads to --



1 as outlined in our brief, Your Honor, the further  
2 trafficking of children.

3 The Court has heard, defense counsel knows,  
4 that alien smuggling organizations specifically advise  
5 aliens to enter the United States with children in hopes  
6 that they will avoid prosecution and avoid immigration  
7 consequences.

8 Your Honor, the -- the procedures are in place.  
9 They're there for ORR to safeguard those children, to  
10 ensure that they do go back to a parent or to a  
11 relative. They're not there to terminate the children's  
12 right. The -- the main goal is so that these -- the  
13 well-being of the defendant's -- of the children is  
14 maintained.

15 Furthermore, Your Honor, the defense has gone  
16 into great length about their children and how their  
17 parental rights are being terminated, yet defense has  
18 offered no proof whatsoever that these are their  
19 children.

20 I'm not sure what -- what the purpose of the  
21 extent of his argument was, Your Honor. I would  
22 reiterate on the record, Your Honor, that the government  
23 was ready to go forth on Wednesday, and the defense --  
24 defendants had to sit in jail over the weekend because  
25 defense counsel was not ready.

1           It's an interesting note that defense counsel  
2 notes that the press is in the courtroom today.

3           So I -- I just wanted to make those arguments  
4 known, Your Honor. And, of course, I'm not disparaging  
5 the Court whatsoever, but I wanted the Court to know  
6 that -- that the policy has never changed, Your Honor.

7           THE COURT: I understand. I -- I go back to  
8 this issue, though. I mean, and I -- I know that the  
9 government takes the position that the regulations  
10 governing the Office of Refugee Resettlement and the  
11 placement of children that -- that policies are made  
12 to -- to basically determine what's in the -- that those  
13 policies were enacted to determine what's in the best  
14 interest of the children.

15           The flipside of that, though, is that, I mean,  
16 the government doesn't -- it has a policy. It talks  
17 about parental rights, about how parents need to be  
18 involved in their -- in a broad sense, that they have --  
19 unquestionably, that there are parental rights.

20           And I -- I just don't see how that declaration  
21 by the government -- and it's a policy that they can  
22 take off their website. They can rescind tomorrow, if  
23 they wish. It's still on there. Then the public can  
24 rely on it.

25           I mean, what -- what -- let -- let me just

1 finish.

2           What meaningful rights a parent would have, I  
3 mean, I don't think it's -- *Padilla* tells us that your  
4 immigration -- the immigration consequences of a plea of  
5 guilty can be a critical factor in determining the  
6 voluntariness of your plea. It is not that much more of  
7 a stretch to say that the immigration consequences of  
8 your -- to your minor children -- to your minor  
9 children, how that might be a factor. And as a  
10 practical matter, it may be the single most important  
11 factor that you're considering if you're a defendant,  
12 and -- and if you're a defendant charged with these  
13 offenses, and it may be the number one thing you want to  
14 do.

15           And so a troubling part of this is that part of  
16 your motivation would be, since I have no information  
17 right now, I have no way of getting any information  
18 right now, getting out of here and getting done with my  
19 case may be -- as soon as possible may be the best  
20 option that I have to try to get involved with my  
21 child's immigration status. At this point, they don't  
22 know whether they are going to get deported before,  
23 after or at the same time as their kids.

24           And -- and that is -- if -- if you were in the  
25 defendant's shoes, that would be a consideration. I

1 don't think there's any doubt about that, that that may  
2 be the single most important consideration you have in  
3 trying to make a determination about your own criminal  
4 case, whether you plead guilty or whether you have a  
5 trial. So anyways.

6 MS. FRANCO-GREGORY: Your Honor, there is no  
7 evidence on the record to support any of those  
8 contentions made by these defendants. Indeed, I would  
9 reiterate that there is no evidence on the record  
10 supporting that those minors that were traveling with  
11 those defendants are even their children. Those are a  
12 lot of conclusions that have been made, but these  
13 defendants have never had the opportunity to address  
14 that on the record.

15 THE COURT: Okay. And how does the government  
16 allow for a defendant to make that showing, then, in  
17 order to get some of this information?

18 MS. FRANCO-GREGORY: Your Honor, the government  
19 would rely again on the brief. That is not -- as the  
20 Court stated, the Court may go into that issue --

21 THE COURT: Uh-huh.

22 MS. FRANCO-GREGORY: -- at the plea hearing,  
23 but the remedy is a trial. The remedy is not a  
24 dismissal of the case.

25 And -- and that is really one of the

1 government's prime concerns is that a lot of assumptions  
2 have been made on behalf of these defendants, yet they  
3 have never had the opportunity to address the Court and  
4 put in the record in their own words their concerns.

5           And, again, there is no evidence supporting  
6 that the children that they were traveling with are  
7 indeed their children. And, again, the safeguards  
8 implemented by ORR are to protect those children, to  
9 ensure that they were not being trafficked, and that  
10 indeed those are their children.

11           So we're making a lot of assumptions. Yet,  
12 there is no evidence to support those allegations.

13           THE COURT: And -- and let me just say this:  
14 Let's say -- let's assume for the sake of argument that  
15 a defendant wanted to make a showing. I mean, there has  
16 to be some mechanism for them to make a showing that  
17 they're the parent, I mean.

18           And -- and so I just -- what I'm having trouble  
19 with is getting a one-way message to the child. Is  
20 that -- is that consistent with a constitutional concept  
21 of familial relation -- of -- yeah, familial  
22 relationships, basically, your parental rights? Just  
23 basically not being in communication with your child. I  
24 mean, that's what I'm troubled with.

25           MS. FRANCO-GREGORY: But -- but, Your Honor --

1           THE COURT:   Setting aside the evidentiary  
2 issues, which, you know, you've raised and I  
3 understand.

4           MS. FRANCO-GREGORY:   But, Your Honor, the  
5 assumption there is that there is -- that these are the  
6 parents with no evidence to support that they are the  
7 parents.

8           THE COURT:   So the government's default is that  
9 they're not the parents?

10          MS. FRANCO-GREGORY:   No, Your Honor.   But --  
11 and, again, we're going so far away from -- from the  
12 issues at hand, which is a criminal prosecution of a  
13 misdemeanor illegal entry into the United States.   And  
14 the government would re-urge what is contained within  
15 the brief, that the issue as far as providing them  
16 notice as to the status of the child that they were  
17 accompanied with is not ripe at this time.

18          THE COURT:   All right.

19          MS. FRANCO-GREGORY:   And so, again, the issue  
20 of establishing whether they're not parents or they are  
21 parents is not a matter before the Court.   And so the  
22 government would rely on that argument and also stress  
23 that there is no evidence at this point supporting that  
24 they are indeed the parents of those children, and,  
25 again, stressing how the government outlined in its

1 brief there are many instances, including misdemeanor  
2 cases, where children are brought in with aliens in the  
3 hopes of not being prosecuted criminally or are facing  
4 immigration consequences.

5 THE COURT: And the government has said that  
6 repeatedly, but I'm sure there's many cases where that's  
7 not the case.

8 And so, I mean, what -- what is the  
9 government -- I'll just ask you if you know. But at  
10 what point do the parents get to find out anything about  
11 their kid's case?

12 I mean, they may be sitting here -- and, again  
13 you've have raised these evidence issues, which I don't  
14 think are -- I mean, which I think are -- are  
15 legitimate. But I'll tell you this, I mean, if you're  
16 making a decision about processing your own case and  
17 trying to figure out whether you're going to plead  
18 guilty or not, I mean, at what point do you get to find  
19 out, according to government policy, if you happen to  
20 know, when -- whether you are going to be deported at  
21 the same time as your child or before or after or when  
22 will they put them in touch?

23 I mean, they're here with minors. And if they  
24 process these cases, and they go over -- I'm talking  
25 about practical things here. They -- if they plead

1 guilty here and they go over to the camp, at what point  
2 do they get to find out anything about their kids?

3           So I don't think there is a mechanism in place  
4 for the government. The government is tell -- telling  
5 me -- tells me in their brief they are not compelled to  
6 do that. But they're not forbidden from doing it  
7 either.

8           It's -- I -- again, and I go -- I go to this,  
9 as a practical consideration and up here as somebody  
10 that has to make a determination on voluntariness of  
11 pleas, just not knowing anything about the kids, yes, it  
12 could be a factor. I think it could be a factor that,  
13 if I was in their shoes, I'd be concerned about where my  
14 kids were also.

15           So, in any case, I'll just -- I'll just leave  
16 it at that.

17           MR. GARCIA: Judge -- Judge, I --

18           THE COURT: I -- I think -- I'm going to just  
19 cut it off here.

20           Is there anything else, Ms. Franco?

21           MS. FRANCO-GREGORY: No, Your Honor. Just that  
22 this is a misdemeanor 1325 case, the government  
23 establishing whether or not their parents is not an  
24 element of this offense.

25           MR. GARCIA: Judge, and you can overrule me on



1 the record if you want to, but I was -- I feel that the  
2 comments of having two lawyers argue, I think at least  
3 I'm entitled to clarify a couple of things that Ms.  
4 Gregory said.

5 THE COURT: I appreciate it. I think we've  
6 heard enough argument. At least the Court has.

7 Here is what the Court is going to do, okay?  
8 I've heard these arguments. You've heard some of the  
9 concerns that I have.

10 In terms of the relief that the defendants are  
11 requesting, okay -- this is a motion to dismiss alleging  
12 constitutional violations -- I am -- I am going to deny  
13 the defendant's motion to dismiss, okay? I will issue  
14 an order explaining my reasons, but I am going to deny  
15 the motion to dismiss.

16 I don't disagree with the government that some  
17 of these issues are issues that are definitely within  
18 the purview of the Court, in terms of any possible  
19 *Padilla* implications, but certainly under Rule 11 of the  
20 Federal Rules of Criminal Procedure involving --  
21 regarding the voluntariness of a plea, that those are  
22 things that I can consider. But I am -- I am denying  
23 the motion.

24 Did you --

25 MR. GARCIA: Yes. I want to object to the

1 ruling pending an appeal in the district court.

2 THE COURT: Yes, sir.

3 MR. GARCIA: So I would like you to, please,  
4 allow us to -- to -- to stay the proceedings at least  
5 until I file an appeal. I probably could file it today,  
6 but I intend to file this with the district court.

7 THE COURT: Okay. Now, here's my -- the  
8 problem is this: I'm not going to have an order on this  
9 explaining basically the reason for my ruling. I'm not  
10 going to have an order on this for, let's say, by the  
11 end of the week or early next week.

12 The issue is this. Let me ask you this  
13 question: Because we do have the pending matter of  
14 this -- of the plea offer that the government wants to  
15 put on the record, my question to you is -- and I  
16 don't -- I'll leave it to you -- but I don't know  
17 whether it affects your appellate rights or not, but do  
18 you want to address the issue of whether your clients  
19 want to be rearraigned on this issue or -- or whether  
20 you want to proceed to trial on these?

21 Basically, here is what I'm going to do: If  
22 your clients want to enter a plead -- a plea and change  
23 their plea today, I don't know whether that necessarily  
24 affects your appellate rights, which --

25 MR. GARCIA: Yeah. I would rather just hold on

1 and let me file my appeal because I believe that the  
2 district court might -- may -- may decide otherwise.  
3 And if that's the case, then -- then -- then the motion  
4 to dismiss is -- is dispositive.

5 Judge, and I know we're establishing a record  
6 here, but now that you have denied my motion, you at  
7 least need to let me clarify a couple of things, just  
8 for purpose of the record, because I'm going to request  
9 a transcript.

10 THE COURT: That's fine.

11 MR. GARCIA: And this transcript is going to be  
12 used.

13 Ms. Gregory stood up here and told me --

14 THE COURT: Do you want to come up to the  
15 podium?

16 MR. GARCIA: Sure.

17 Ms. Gregory stood up here and told you that,  
18 you know, this could be alien smuggling -- trafficking  
19 matter cases. Well, that's not the case.

20 MS. FRANCO-GREGORY: Your Honor, I object.  
21 That's alien smuggling.

22 MR. GARCIA: Judge, this --

23 THE COURT: I'm sorry?

24 MR. GARCIA: -- this is -- this is a pretrial  
25 matter.

1 MS. FRANCO-GREGORY: It's alien smuggling, for  
2 purposes of the record. I did not say trafficking of  
3 minors.

4 MR. GARCIA: Well, alien smuggling.

5 Well, that's not the case. If that was the  
6 case, they would not hesitate to charge them with that,  
7 and the reason why they can't charge them is because  
8 they would have the burden to prove that that is the  
9 case.

10 Second of all, she said that we weren't ready  
11 last Wednesday. Let me remind Ms. Gregory on the record  
12 that, you know, the clients -- the five clients were in  
13 three different federal prisons, and they had to be  
14 gathered, and they were not gathered until late in the  
15 afternoon on Monday. That's why we requested the --  
16 the -- this short continuance.

17 And last, Judge, she stood up here telling you  
18 these are misdemeanor cases, that they -- that she's  
19 concerned with this -- with the well-being of my  
20 clients. That's disingenuous. And it's disingenuous  
21 because if she was truly concerned, she would not  
22 separate them from their children. We don't even  
23 separate puppies from a dog, Judge.

24 So based on those issues, I think it's an error  
25 to deny the motion to dismiss --

1 THE COURT: Of course.

2 MR. GARCIA: -- and we would like to request,  
3 based on the fact that the clients are facing extreme  
4 prejudice and -- and hardship, an opportunity to stay  
5 the proceedings so that we can file an appeal.

6 I will inform the Court if -- if the decision  
7 of my clients change, but I would like to have an  
8 opportunity so that I can confer with them, and in the  
9 meantime, stay the proceedings.

10 THE COURT: Will you file a motion staying  
11 the -- or file -- will you be filing something with the  
12 Court staying the proceedings, giving me authority to do  
13 so, or -- or indicating to me what my authority is to do  
14 so?

15 MR. GARCIA: Well, I -- I could do so, Judge.  
16 I -- I -- I certainly can do that.

17 THE COURT: I'm making that request.

18 MR. GARCIA: Okay. Sounds good.

19 THE COURT: If you -- if you could do that and  
20 give the government the opportunity to file a  
21 response.

22 Now, and at this time -- go ahead, Ms. Franco.

23 MS. FRANCO-GREGORY: Your Honor, we have the  
24 trial setting on Friday. And so the government would  
25 just offer that the impact of the plea offer that is

1 made to the defendants is diminished every day.

2 THE COURT: Uh-huh.

3 MS. FRANCO-GREGORY: And I -- I would ask,  
4 reiterate again that these defendants at least have the  
5 opportunity to address the Court, and make certain that  
6 defense counsel has apprised them of the plea offer we  
7 made on November the 9th.

8 THE COURT: I think -- so we had that matter  
9 pending. When I first -- I first saw a motion, which I  
10 granted, which the government just basically would be  
11 putting their -- the plea offer on the record, and the  
12 defendants on the record would indicate whether or not  
13 they were accepting or rejecting the plea offer.

14 MR. GARCIA: Once we're done with the pretrial  
15 matters, yes, Judge, I guess, at that point, we get to  
16 that -- to the *Lafler* motion, yes, that probably would  
17 be the case.

18 THE COURT: But what about now?

19 MR. GARCIA: Not right now, Judge. I would  
20 like an opportunity to get -- to file an appeal. I'm  
21 still dealing with a pretrial matter, which is the --  
22 the motion to dismiss. If that motion is granted -- and  
23 I'm not sure, I'd have to check to see if I could  
24 plea -- if I could file an interlocutory appeal. But if  
25 that -- it is granted, then it's dispositive, and

1 this -- my clients will find the relief that we're  
2 seeking, so...

3 THE COURT: But -- but -- okay. I'm trying to  
4 understand. A *Lafler Frye* hearing is basically to allow  
5 to put on the record that a plea offer has been made and  
6 the substance of that offer. And your clients would, on  
7 the record, say whether or not they were accepting or  
8 rejecting this offer.

9 MR. GARCIA: Yes. I guess -- I guess that  
10 would be the case, once we get done with the resolution  
11 of the motion to dismiss. If the -- if the -- if the  
12 district court is denying my appeal or if my clients  
13 want -- want to plea, then obviously we'll address  
14 that.

15 THE COURT: So you're saying it's untimely, I  
16 mean, to --

17 MR. GARCIA: It's untimely, Judge. It's a  
18 mechanism to bypass. There is no restriction on speedy  
19 trial just because -- if you look at the -- at the -- at  
20 the definition --

21 THE COURT: Well, it's your motion.

22 MR. GARCIA: Yeah, exactly.

23 THE COURT: There's no speedy trial issue  
24 now.

25 MR. GARCIA: There is no -- there is no issues

1 there.

2           So I would like an opportunity to -- to -- this  
3 is a very important issue, Judge. It's -- it's going  
4 all across the nation. It's -- it's -- it's a matter of  
5 first impression, and I would like to request an  
6 opportunity so that I could file the appeal.

7           And while I do that, I will also talk to my  
8 clients. If they change their mind and they want to  
9 proceed otherwise, I'm sure they will inform me and I  
10 will inform the Court. But I'd like to have the  
11 opportunity to, at least, to -- to file that appeal, and  
12 to confer with my clients and explain to them what just  
13 happened.

14           MS. FRANCO-GREGORY: And, Your Honor, the trial  
15 setting is set for Friday. The government -- again, the  
16 plea offer is diminished each day. The trial setting  
17 hasn't gone away.

18           THE COURT: What do you mean that, that it's  
19 diminished?

20           MS. FRANCO-GREGORY: So the offer that we made  
21 to the defendants, the impact of that plea is diminished  
22 the closer we get to trial.

23           MR. GARCIA: Right. Without getting to the  
24 merits of -- of what Ms. Gregory is talking, okay,  
25 without getting to the merits, Judge, let me just point



1 out one thing. These plea agreements are nothing but a  
2 legal fiction, and I'm going to tell you why. Because  
3 there is no judge -- and I clerk for six different  
4 judges all across the nation. There is no judge that  
5 would sentence these misdemeanor defendants to anything  
6 other than time served, okay?

7           The fact that she -- the fact that she is  
8 offering this plea agreements, it doesn't make the  
9 penalty harsher for my clients, Judge.

10           THE COURT: Look, the point is whether the  
11 government has the right to put that offer on the  
12 record, and that your clients can accept or reject it at  
13 that time, okay -- at that time.

14           Given my decision this morning, given the fact  
15 that you'll be filing a motion to stay, I guess, pending  
16 whatever appeal you're -- you're -- you will be  
17 pursuing --

18           MR. GARCIA: Because I don't want to waive any  
19 issues, Judge. I waited -- I need to make sure that a  
20 procedure is correctly, because even if one client  
21 decides to go with this, you know, I don't want to have  
22 any waivers. The Fifth Circuit is very strict on  
23 waivers. So that's why I'm asking you for an  
24 opportunity so that I can file the -- the -- what you  
25 request, to stay the proceedings, and so that I can file

1 an appeal, because, you know, I'm concerned with waiving  
2 issues.

3           So I can't -- I can't go ahead with the *Lafler*  
4 *Frye* hearing, and then the Fifth Circuit constitutes  
5 that as a waiver. I can't do that.

6           THE COURT: All right. Look, I had granted it  
7 just to get the -- just to get that offer on the record.  
8 If you're saying that it's premature to do that, I mean,  
9 you can -- you can brief that. You can brief that, and,  
10 I mean --

11           MR. GARCIA: Well, it's a pretrial matter,  
12 Judge, and pretrial matters are dealt with before we get  
13 to the trial matters, which is -- you know, the *Lafler*  
14 *Frye* hearing is a matter just before a trial.

15           THE COURT: Look, I understand the concerns  
16 that you're raising, okay? That you don't -- you're  
17 concerned about any waivers your clients might be making  
18 in light of a -- in light of the fact that they'll be  
19 appealing this decision.

20           The question is whether this is something that  
21 the -- does the government have the right to put this --  
22 this on the record right now? I mean, I have granted  
23 this. I understand your concerns, but I would like you  
24 to raise them.

25           But my inclination is to have a hearing at

1 which this plea offer is conveyed to your clients, okay,  
2 without, in any way, affecting any appellate rights. If  
3 you're telling me your review -- brief this issue and  
4 you give me an authority that says we cannot have that  
5 hearing without impacting their appellate rights, then  
6 I'll reconsider my decision. But other than that, it's  
7 a hearing that I would be inclined to have.

8 Do you understand?

9 MR. GARCIA: Yes, Judge. I think this is their  
10 motion. They should be filing the brief, and I should  
11 be responding. Why should we have this matter when I  
12 have indicated to you, in magistrate court -- courtroom,  
13 that I want to appeal your decision of a motion to  
14 dismiss to the district court?

15 I mean, if the Court wants me, I will file  
16 the -- the petition or the briefs so that we hold on to  
17 this *Lafler Frye* hearing. But they should be the ones  
18 that they should tell you under what authority they have  
19 to bypass this pretrial.

20 THE COURT: Here -- here is the thing, I  
21 granted that, all right? I granted that. But you're  
22 taking a different -- not a different position. You're  
23 taking a different position today based on my decision,  
24 and, you know, I had -- I understand why you're saying  
25 that.

1 MR. GARCIA: Yeah.

2 THE COURT: But the issue is, if you're telling  
3 me, now we can't have that hearing, I want -- I want you  
4 to tell me why we can't have it.

5 MR. GARCIA: Okay.

6 THE COURT: And -- and you can file it in -- in  
7 the form of a motion to reconsider the granting of the  
8 *Lafler Frye* hearing, and I will -- I mean, I'll continue  
9 that issue, but -- but I'd like something --

10 MR. GARCIA: Yeah.

11 THE COURT: -- as soon as possible.

12 MR. GARCIA: And also I just want to point out  
13 for the record --

14 THE COURT: Yes, sir.

15 MR. GARCIA: -- now that you're asking me to  
16 file this, I'm going to -- I'm going to argue that it  
17 was fairer for you to -- to grant it in advance.

18 THE COURT: And that's fine. You can raise  
19 those issues.

20 MR. GARCIA: Yeah.

21 THE COURT: Okay.

22 MR. GARCIA: It was fairer to grant it because  
23 I assumed you granted it before making a determination  
24 on the motion to -- to dismiss on this, that was already  
25 decided. But yes.

1 THE COURT: I just decided today --

2 MR. GARCIA: Okay. Okay.

3 THE COURT: -- so the answer to that is yes.

4 MR. GARCIA: I just want to make sure that  
5 that's on the record like that, yeah. Okay. Okay.

6 THE COURT: I mean, but -- but here's the  
7 thing: What I'm going to afford you is the opportunity  
8 to provide some authority to say, Judge, you need to  
9 reconsider that, and -- but, you know, I would like that  
10 issue -- and you can address it separately or whatever,  
11 but I also want you to give me to -- to tell me what my  
12 authority is to stay this issue pending appeal.

13 MR. GARCIA: Okay.

14 THE COURT: Okay. Because we have that -- and  
15 we have a trial setting set on Friday --

16 MR. GARCIA: I will do so, Judge. I will do  
17 so, Judge.

18 THE COURT: -- which --

19 MR. GARCIA: But I just want to remind the  
20 Court of the extreme hardship and prejudice that my  
21 clients will face, [indiscernible] and continue --  
22 continue accordingly and maybe creating possibility of  
23 waivers for -- for these clients. So I need to be --

24 THE COURT: I'm not sure I follow you on  
25 that.

1           MR. GARCIA: What I -- what I'm saying is that  
2 thanks for the opportunity to give me -- that you're  
3 giving me to file that brief so that we could stay this  
4 proceeding because at stake -- at stake there is some  
5 major important interest of these clients.

6           THE COURT: You have an absolute -- they have  
7 an absolute right to appeal this issue. I don't want to  
8 make any decision that would impact on that. That's why  
9 I'm giving you these opportunities to address that  
10 issue.

11          MR. GARCIA: Thank you.

12          THE COURT: And -- but just to be clear, okay,  
13 I'm asking you to file something in writing where you're  
14 making your request in writing to stay these  
15 proceedings, okay? And we have that trial setting on  
16 Friday.

17           The second thing is, with regard to the *Lafler*  
18 *Frye* hearing, that you take up -- basically, I mean, if  
19 you're asking the Court to reconsider that, which it  
20 seems like that's what you're doing, you tell me why we  
21 can't have it --

22          MR. GARCIA: Okay.

23          THE COURT: -- given -- given the fact -- you  
24 know, and I guess what you're driving at is that it  
25 somehow could impact --

1 MR. GARCIA: Absolutely.

2 THE COURT: -- potentially the appellate --

3 MR. GARCIA: Constitutional rights.

4 THE COURT: -- rights, but you have to show me  
5 that, because I will tell you I'm inclined to have it,  
6 to put it on the record, and do it sooner rather than  
7 later.

8 So you address these issues. I just would ask  
9 you that you address them in short order, all right?

10 MR. GARCIA: I will.

11 THE COURT: Anything else? Anything else,  
12 Mr. Garcia?

13 MR. GARCIA: No, Judge.

14 THE COURT: All right. Anything else from the  
15 government?

16 MS. FRANCO-GREGORY: No, Your Honor.

17 THE COURT: Okay. Very well, then. We're in  
18 recess.

19 (Proceedings concluded)  
20  
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## 1 CERTIFICATE OF ELECTRONIC RECORDING

2  
3 I, Rhonda McCay, CSR, RPR, certify that the  
4 foregoing is a correct transcription from the electronic  
5 recording of the proceedings in the above-entitled  
6 matter.

7 I further certify that I am neither counsel  
8 for, related to, nor employed by any of the parties to  
9 the action in which this electronic recording was taken,  
10 and further that I am not financially or otherwise  
11 interested in the outcome of the action.

12 Signed this 5th day of December, 2017.  
13  
14

15 /s/ Rhonda McCay-----  
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